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No. 229

In the Supreme Court of the United States

OCTOBER TERM, 1946

ROBERT P. PATTERSON, SECRETARY OF WAR, AND EDWARD F. WITSELL, THE ADJUTANT GENERAL, UNITED STATES ARMY, PETITIONERS

v.

JAMES JOHN LAMB

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

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OPINION BELOW

The District Court of the United States for the District of Columbia did not render an opinion. The opinion of the United States Court of Appeals for the District of Columbia (R. 22–29) is reported at 154 F. 2d 319.

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1946 (R. 29). The petition for a writ of certiorari was filed on June 24,

1946, and was granted October 14, 1946 (R. 33). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a court may, by mandamus, order the Secretary of War to issue an "Honorable Discharge from the Army" to an individual who received a "Discharge from Draft" in 1918, over 25 years prior to the institution of suit, where such individual simply reported for induction on November 11, 1918, returned to his home on that day because of the cancellation of all draft calls by order of the President, never entrained for travel to a military camp, never wore the uniform, and never was accepted for military service by the Army.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the statutes, Army Regulations and discharge certificates involved, are set forth in the Appendix, *infra*, pp. 58–75.

STATEMENT

The facts in this case, which are not in dispute, are taken from respondent's amended complaint and from the opinion of the Supreme Court of Iowa cited in paragraph 18 of that complaint.

Pursuant to the provisions of Section 2 of the Selective Draft Act of 1917 (c. 15, 40 Stat. 76, 77–78) and regulations promulgated thereunder,

respondent James John Lamb was ordered by the local draft board at Davenport, Iowa, to report for military duty at 9:00 A. M. on November 11, 1918 (R. 2–3). The order recited that "From and after the day and hour just named you will be a soldier in the military service of the United States" (R. 13). He reported at the time and place fixed in the order and was appointed leader of a contingent of drafted men who were to travel to Camp Dodge (R. 3–4). Thereafter, "the entire contingent went to the Hotel Dempsey, in Davenport, for lunch before entraining for Camp Dodge in Des Moines.[1] While at lunch, a board member arrived and told them they would not entrain for Camp Dodge because 'calls had been cancelled.' He also stated that members of the contingent were dismissed and that written notice of the cancellation would be mailed to each of them." (*Lamb* v. *Kroeger*, 233 Iowa 730, 732; R. 4–5.)

The cancellation of draft calls had been made by order of the Provost Marshal General under instructions of the President, the contents of the order being communicated to all State draft executives by telegram on November 11, 1918 (R. 16). This telegram stated, in part (R. 16), that

[1] It was customary, during the First World War, to arrange more or less elaborate civic celebrations to honor the men selected for service on the occasion of their departure for camp. *Second Report of the Provost Marshal General to the Secretary of War on the Operations of the Selective Service System to December 20, 1918* (1919) 237–238.

> The issue of formal papers of discharge will be considered and determined later, at which time claims for adjustment of pay and allowances for the men so inducted and so discharged will be passed upon.

On November 15, 1918, respondent was notified in writing by his local board of the cancellation order and was advised that "such cancellation in cases of registrants who were inducted has the effect of an honorable discharge from the army" (R. 5, 15). On January 26, 1919, respondent received a certificate entitled "Discharge From Draft", dated November 14, 1918, on Form 638–1, A. G. O. (R. 5–6, 17).[2]

For a number of years prior to 1941, respondent claimed and received under the tax statutes of Iowa a $500 exemption, applicable to the property of "any honorably discharged soldier." In 1941, the State authorities denied him the exemption, a denial which was upheld by the Iowa Supreme Court. *Lamb* v. *Kroeger*, 233 Iowa 730, decided March 9, 1943, rehearing denied, June 18, 1943. (R. 7–9.) The court relied in part on an opinion of the Attorney General of Iowa, rendered in 1922 (1922 A. G. O. 194), to the effect that persons holding Discharges from Draft were not within

[2] We point out below, pp. 18–22, that Form 638–1 was adapted from Form 638 (Appendix, *infra*, pp. 68–71), which was used for the discharge of men rejected at the mobilization camps for various reasons. The use of Form 638 was authorized by War Department Circular No. 651 of January 12, 1918 (Appendix, *infra*, pp. 62–66).

the exemption statute, but decided the case purely as a matter of state law, saying (233 Iowa at 734): "We are here concerned with what the Iowa Legislature, not draft-law administrators, or United States Government officials, meant by the term 'honorably discharged soldier * * * of the war with Germany.'"

Thereafter, respondent applied to The Adjutant General, United States Army, for a certificate of Honorable Discharge, and, upon denial of the application, brought this suit in the District Court of the United States for the District of Columbia against the then Secretary of War and the then Adjutant General,[2] seeking a declaratory judgment that respondent was entitled to a certificate of Honorable Discharge, and seeking also a mandatory injunction directing the petitioners to issue such a certificate. The case was heard on an amended complaint (R. 2–19)—filed on October 28, 1944, nearly 26 years after respondent's release from military service—and a motion to dismiss (R. 19–20). The motion was sustained by the district court, which ordered the complaint dismissed (R. 20).

On appeal, the court below reversed, holding that respondent was entitled to an Honorable Discharge by virtue of Paragraph 150 of the Army Regulations then in force (R. 25–26; Appendix

[2] The present petitioners, successors in office, were duly substituted in the court below (R. 30).

infra, pp. 61–62). The court held that Discharges from Draft issued under Circular No. 651 of January 12, 1918 (*infra*, pp. 62–66), were appropriate only for men rejected at the mobilization rendezvous;[*] that Form 638–1, discharging men by reason of the President's order of November 11, 1918, suspending further draft calls, was first "officially authorized" by Circular No. 111 of December 4, 1918 (Appendix, *infra*, pp. 66–68); and that that Circular could not be applied to a separation which occurred before its effective date (R. 26–27). The court refused to hold that respondent had been guilty of laches, saying that until the decision of the Iowa Supreme Court he "had no basis for supposing that there was any doubt concerning his status as an honorably discharged soldier" (R. 28).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the amended complaint stated a claim upon which relief could be granted.

2. In holding that an action seeking a mandatory injunction could be maintained against petitioners in the instant case.

3. In holding that respondent was entitled to a certificate of "Honorable Discharge from the United States Army."

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[*] Under Selective Service Regulations (1917–19) Nos. 174–177, draftees were not finally accepted or rejected for military service until after examination at the mobilization camp.

4. In holding that the certificate of "Discharge from Draft" issued to respondent was not authorized by law.

5. In holding that it could interfere with the Secretary of War and the Adjutant General of the Army in a matter relating to the internal administration of the military service.

6. In failing to hold that respondent was barred by his laches from maintaining the instant suit.

7. In reversing the District Court.

SUMMARY OF ARGUMENT

I. A. The only statutory provision governing discharges in force at the date of the respondent's discharge was the 108th Article of War, which by its terms granted the enlisted man only the right to a certificate of discharge, not to any particular kind of discharge. Accordingly, it has been uniformly held that a person discharged from the military service cannot, if dissatisfied with the type of certificate issued him, resort to the courts for relief, regardless of the nature of the remedy sought. New legislation was required when Congress in 1944 intended to provide for review of the discharges issued to veterans of World War II.

B. Paragraph 150 of the 1913 Army Regulations governed the discharge, in 1918, of men who were in the Army. Under the 1917 draft law, men were inducted and became subject to military law when they were ordered to report; but they were not accepted or rejected by the

Army until they reached the mobilization camps. Men rejected by the Army were not within the purview of par. 150, not being in the Army; instead, they received Discharges from Draft. When all outstanding draft calls were cancelled because of the Armistice, the men inducted but not yet accepted were analogized to the men rejected rather than to those accepted. The line was drawn between men in, and men not in, the Army. The form of Discharge from Draft could have been used for the men in respondent's position; Form 638–1 shows on its face that it did not depend for its validity on Circular No. 111 of December 4, 1918.

C. Even if the case of the men not accepted by the Army because of the cancellation of draft calls was not covered by the regulations in force on November 11, 1918, the Secretary was not shackled by his own regulations; he was free to deal with unforeseen contingencies as they arose. *Denby* v. *Berry*, 263 U. S. 29, 38. The Armistice came at a time when the expanding military program necessitated increased draft calls. Respondent is not entitled, by reason of the Army's failure to divine the future, to be placed on a parity with those who were accepted by the Army and actually served, and in a more advantageous position than those who proceeded to camp and were there rejected by the Army.

D. The distinction between a Discharge from

Draft and an Honorable Discharge was recognized by Congress in 1924, when it denied the holder of the former any right to adjusted compensation (38 U. S. C. 602 (i)), but awarded him rights to disability compensation and insurance (38 U. S. C. 448). This recognition may well amount to ratification; in any event, it underscores the soundness of petitioners' refusal to issue an Honorable Discharge in the present circumstances.

II. A, B. Discharges from the armed forces have always been held to be discretionary with the military and naval establishments, so much so that the form or type of a discharge will not be reviewed by the courts even in the event of noncompliance with a regulation. That being so, there is brought into play the firmly settled rule that decisions of administrative officers, where they involve an exercise of discretion, and insofar as they are neither unreasonable nor plainly wrong, will not be set aside by process in the nature of mandamus. Here the Secretary of War did not have in 1918–19 a plain ministerial duty, equivalent to a positive command, to issue a discharge from the Army to a man who had never been accepted by the Army. *A fortiori,* the present petitioners do not have a plain ministerial duty, equivalent to a positive command, to issue to respondent at this time a form of discharge different from that given him in 1919, and which

neither he nor any of the thousands similarly situated had ever questioned in the intervening years.

C. The rule that discretionary action on the part of executive officers acting within the scope of their statutory authority will not be controlled by the courts has particular force as applied to the military establishment; and this Court has repeatedly refused to sanction judicial intrusion into the realm of ordinary military and naval administration. *Reaves* v. *Ainsworth*, 219 U. S. 296; *French* v. *Weeks*, 259 U. S. 326; *Creary* v. *Weeks*, 259 U. S. 336; *Denby* v. *Berry*, 263 U. S. 29.

D. The foregoing standards of review, as to discretionary matters generally, and as to military and naval administration specifically, were not modified by anything contained in the Administrative Procedure Act. To begin with, its provisions as to judicial review, which became effective over two months after the petition for certiorari had been filed in this case, are not applicable to pending cases; nothing in the statute or its legislative history reflects any purpose to alter the scope of judicial review where the proceedings in review have entered upon the ultimate appellate stage. Moreover, and in any event, both the language and the legislative history of the Administrative Procedure Act show a clear intent to preserve the existing scope of judicial review. The debates are devoid of any suggestion that the rule with reference to the function of mandamus

was even under consideration. Strong and apt language would be necessary to overturn a doctrine so firmly settled, particularly in its application to the field of routine military administration. The Act evidences no such purpose.

E. The circumstance that a Discharge from Draft has been treated by Congress and some state courts as being equivalent, in some situations, to an Honorable Discharge, does not support the view that the Secretary of War can be compelled to issue the latter to a man who received only the former. Indeed, the recognition by Congress of the Discharge from Draft, with a limitation on the benefits such a discharge was to carry, supports the position of petitioners here.

III. In any event, respondent's claim is now barred by laches; after more than a quarter of a century it is obviously a stale demand. The doctrine of laches applies to actions for mandamus, which have been held barred by much shorter delays. Cf. *Arant* v. *Lane*, 249 U. S. 367. The decision of the Iowa court rejecting respondent's claim for a tax exemption disclosed no fact hitherto unknown. If respondent was wronged by the receipt in 1919 of a Discharge from Draft on the ground now asserted, viz., that its issuance was in violation of controlling regulations, he was chargeable then with the distinction between what he received and what now he contends was required. Certainly the

distinction was created neither by the Iowa court in 1943 nor by Congress when in 1924 it attached substantive consequences to the distinction. Moreover, the far-reaching unsettling of military and fiscal administration which would follow acceptance of respondent's contentions after so long a period of time makes applicable the rule than mandamus will not issue to direct an act which will work a public mischief. *Duncan Townsite Co.* v. *Lane*, 245 U. S. 308, 311.

ARGUMENT

I

RESPONDENT'S CERTIFICATE OF DISCHARGE FROM DRAFT WAS ISSUED PURSUANT TO THE DISCRETION VESTED BY LAW IN THE SECRETARY OF WAR

A. THE ONLY STATUTORY PROVISION GOVERNING THE MATTER GIVES THE PERSON DISCHARGED FROM THE MILITARY SERVICE ONLY A RIGHT TO A CERTIFICATE OF DISCHARGE, NOT TO ANY PARTICULAR FORM OF DISCHARGE

The only statutory provision in force governing discharges at the date of Lamb's discharge was the 108th Article of War of the 1916 Code (Act of August 29, 1916, c. 418, 39 Stat. 619, 668; Appendix, *infra*, p. 58), which provided as follows:

> ART. 108. SOLDIERS—SEPARATION FROM THE SERVICE.—No enlisted man, lawfully inducted into the military service of the United States, shall be discharged from

> said service without a certificate of discharge, signed by a field officer of the regiment or other organization to which the enlisted man belongs or by the commanding officer when no such field officer is present; and no enlisted man shall be discharged from said service before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court martial.

This provision did not prescribe the form, terms, or type of certificate, leaving these matters to the unfettered discretion of the civil heads of the military establishment; by its terms it granted the enlisted man only the right to a certificate of discharge, not to any particular kind of discharge.

The court below, prior to its decision in the present case, had applied the well-settled principle, deduced from the 108th Article of War of 1916 and its statutory predecessors,[5] that since the individual discharged from the military service was not entitled by law to any particular form of discharge, he could not, if dissatisfied with the

[5] Similar provisions appeared in earlier military codes. See AW 4 of the Code of 1874 (R. S. 1342); AW 11 of the Code of 1806 (Act of April 10, 1806, c. 20, 2 Stat. 359, 361); AW 13 of the Code of 1786 (Res. of May 31, 1786, 30 J. Cont. Cong. 316, 319), continued in force under the Constitution by Sec. 4 of the Act of Sept. 29, 1789, c. 25, 1 Stat. 95, 96.

The present 108th Article of War (Act of June 4, 1920, c. 227, 41 Stat. 759, 809; 10 U. S. C. 1580) is identical with the same article of the 1916 Code.

type of certificate issued him, resort to the courts for relief (*Davis* v. *Woodring*, 111 F. 2d 523 (App. D. C.)); and the rule was the same whether he sought a writ of mandamus against the Secretary (*Davis* v. *Woodring*, *supra*) or whether he sued for back pay claimed to be due him (*Reid* v. *United States*, 161 Fed. 469 (S. D. N. Y., *per* Hough, D. J.), writ of error dismissed for want of jurisdiction, 211 U. S. 529; *Palmer* v. *United States*, 72 C. Cls. 401), even when he could establish a noncompliance with governing regulations (*Palmer* v. *United States*, *supra*). The Secretary could not be required to revoke a discharge or an order of separation from the service (*Denby* v. *Berry*, 263 U. S. 29; *Nordmann* v. *Woodring*, 28 F. Supp. 573, 575 (W. D. Okla.), nor his subordinates to issue one (*Miller* v. *Commanding Officer*, 57 F. Supp. 884 (N. D. Tex.)). Indeed, the law on this point had been deemed so firmly established—certainly so far as the Army and Navy were concerned[6]—that new legislation was required when Congress desired to provide for review of the discharges issued to veterans of World War II. Section 301, Servicemen's Read-

[6] Compare *Hurley* v. *Crawley*, 50 F. 2d 1010 (App. D. C.). If this case is still law since *Davis* v. *Woodring*, 111 F. 2d 523, *supra*, it must be because there the issue was as to the effect to be accorded plaintiff's Discharge from Draft in relation to his civil service preference, and did not involve an attempt to obtain a different kind of discharge from the military authorities. See pp. 46–49, *infra*.

justment Act of 1944, Act of June 22, 1944, c. 268, 58 Stat. 284, 286–287, 38 U. S. C., Supp. V, 693h.[7]

B. THE DISCHARGE FROM DRAFT GIVEN RESPONDENT HERE WAS AUTHORIZED BY THE REGULATIONS IN FORCE AT THE TIME OF ITS ISSUANCE.

The court below assumed (R. 25–27) that the discharge issued by respondent was not authorized by the regulations in force at the date of his discharge. Examination of those regulations discloses the unsoundness of the assumption.

When World War I began, the types of discharges to be given on the soldier's separation from the Army were prescribed by Paragraph 150 of the Army Regulations of 1913 (as corrected to April 15, 1917).[8] This paragraph was as follows:

[7] See the remarks of Mr. McCormack discussing Section 301 in the House (90 Cong. Rec. 4538): "We felt that some machinery should exist in the Navy Department and the War Department whereby veterans could have a review without the necessity of having their discharges corrected by specific acts of Congress."

See also Sec. 131 of the Legislative Reorganization Act of 1946 (Pub. Law 601, 79th Cong., 2d sess.), prohibiting the consideration of any bill authorizing or directing "the correction of a military or naval record," and Sec. 207 of the same bill, authorizing the heads of the departments involved to establish civilian boards for this purpose.

[8] Congress conferred express authority for the issuance of regulations for the government of the Army by the Act of March 1, 1875, c. 115, 18 Stat. 337, 10 U. S. C. 16, though doubtless the President always had such power by virtue of being the Commander-in-Chief. *United States* v. *Eliason*, 16 Pet. 291, 301; *United States* v. *Freeman*, 3 How. 556, 567; *Gratiot* v. *United States*, 4 How. 80, 118; *Kurtz* v. *Moffitt*, 115 U. S. 487, 503; see Lieber, *Remarks on the Army Regu-*

150. Blank forms for discharge and final statements will be furnished by the Adjutant General's Department and will be retained in the personal custody of company commanders. Discharge certificates will be used in the discharge of enlisted men and for no other purpose, and will be of three classes: For honorable discharge, for discharge, and for dishonorable discharge.

They will be used as follows:

1. The blank for honorable discharge, when the soldier's conduct has been such as to warrant his reenlistment and his service has been honest and faithful.

2. The blank for dishonorable discharge, for dishonorable discharge by sentence of a court martial or a military commission.

3. The blank for discharge when the soldier is discharged except as specified under sections 1 and 2 of this paragraph (C. A. R. Nos. 14 and 34).

With the passage of the Selective Draft Act of 1917, induction was added to enlistment as a mode of entering military service, i. e., of effecting the transition from civilian to military status. Numerous questions turned on the determination of the precise time when the person entered the military service and became subject to military law. General Crowder's *Second Report, supra*, p. 3, thus phrased the moment of transition (p. 221):

lations (1898), 48–49, 72–73, 151–184. The court below was in error (R. 25) in resting the Secretary's authority in this regard on R. S. 161, 5 U. S. C. 22, which refers only to the executive departments.

The act of enlistment is effected by the proper officer's acceptance of the applicant and by the applicant's taking the oath of enlistment.

Under the selective service act, no oath was provided for entrance into service by the selective draft. * * * But it was early held, in the administration of the act, that the decisive point of time was the time duly set by the local board (or the State adjutant general) for the registrant to report to the board for military duty, preliminary to entrainment for camp.

* * * * * *

The question of principle involved was a novel one; but the solution thus early adopted by this office was a logical consequence of the second article of war,[9] and it was fully and consistently confined by the opinions of the Federal courts[10] * * *.

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[9] Of 1916 (39 Stat. at 651): "The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law' * * *

"(a) * * * persons lawfully called, drafted or ordered into, or to duty or for training in, the said [military] service [of the United States], from the dates they are required by the terms of the call, draft or order to obey the same; * * *"

[10] Citing *Franke* v. *Murray*, 248 Fed. 865 (C. C. A. 8). *Accord: Ex parte Bergdoll*, 274 Fed. 458 (D. Kan.); *United States ex rel. Feld* v. *Bullard*, 290 Fed. 704 (C. C. A. 2), certiorari denied, 262 U. S. 760; *United States* v. *McIntyre*, 4 F. 2d 823 (C. C. A. 9); *United States ex rel. Bergdoll* v. *Drum*, 107 F. 2d 897 (C. C. A. 3), certiorari denied, 310 U. S. 648.

> At the day and hour specified for reporting for duty, the local board formed the men in single rank, called the roll, appointed the party leader and the squad leaders, and read a short address, instructing them in the preparations to be made, and declaring them to be now "in the military service of the United States." This was the moment of induction. They were then dismissed until the second roll call, prior to entrainment.[11]

However, although inducted into the military service and subject to military law, the selected men of 1917–1918 were not actually in the Army until they had been accepted by the Army at the mobilization camps. See Selective Service Regulations (1917–19), Nos. 174–177. Many were rejected for physical disqualifications, others because they were aliens or enemy aliens, still others for dependency or other reason for deferred classifications.

Discharges for men in the Army continued to be governed by par. 150, A. R. 1913. For men inducted but thereafter rejected by the Army, another procedure was devised. As early as January 12, 1918, the War Department by Circular No. 651 (Appendix, *infra*, pp. 62–66) had provided

[11] Under the Selective Training and Service Act of 1940, however, selectees were not subject to military law until they had been accepted by the Army and had taken the oath. See *Billings v. Truesdell*, 321 U. S. 542.

that as to such men, rejected on any one of several grounds—and the Circular did not purport to restrict the grounds or reasons for which a given individual might be rejected—would not be given an Honorable Discharge, but would be issued a Discharge from Draft on Form No. 638, A. G. O. (Appendix, *infra*, pp. 68–71), together with pay until date of discharge.

The several discharge certificates were appropriately worded to reflect both the military status of the discharged person as well as the reasons for his separation.

The "Honorable Discharge from The United States Army" (Appendix, *infra*, pp. 72–73; A. R. 150, par. 1) recited that the individual—giving his name, grade, and organization, "United States Army"—,

> as a Testimonial of Honest and Faithful Service, is hereby Honorably Discharged from the military service of the United States by reason of * * *

If such discharge was by reason of expiration of term of service, that fact was entered on the certificate; and a note thereon directed that "If discharged prior to expiration of service, give number, date, and source of order or full description of authority therefor."

The blue "Discharge from The United States Army" (Appendix, *infra*, pp. 74–75; A. R. 150, par. 3) recited that the individual—giving his

name, grade, and organization, "United States Army"—

> is hereby Discharged from the military service of the United States by reason of * * *

The note at the foot of the blue discharge directed, "State fully actual cause of discharge, giving number, date, and source of order or full description of authority therefor."

The "Discharge from Draft" on Form No. 638, A. G. O. (Appendix, *infra*, pp. 68–71) recited that the individual—without more—

> is hereby Discharged from the military service of the United States by reason of * * *

The note on the Discharge from Draft stated that "This form will be used for discharge of aliens and alien enemies and of men rejected on account of physical unfitness, dependency, etc."

In other words, if a man had been accepted by the Army, he was described as a member of the Army by grade and organization and discharged from the Army, while if he had been rejected by the Army, he was simply discharged from the draft as an individual—even though prior to rejection he may have worn the uniform and performed the duties of a soldier, as in *Davis v. Woodring*, 111 F. 2d 523 (App. D. C.). Obviously he could not be described as a member of the Army, with serial number, grade, and organization, when the Army

had never accepted him. The very form of an Honorable Discharge emphasizes its inappropriateness for a person in respondent's situation.[12]

It is significant in this connection that, after October 1, 1918, induction into the military service did not automatically direct the selected man towards the Army. After that date, men were also inducted for duty in the Navy and the Marine Corps. See *Second Report of the Provost Marshal General,* p. 226; *Final Report of the Provost Marshal General* [corrected edition], p. 54. This circumstance emphasizes the necessity for distinguishing between induction into military service and acceptance by the Army.

When all outstanding draft calls were cancelled on the day the Armistice was signed, the military authorities, as we have pointed out (*supra,* p. 4), did not immediately determine what form of discharge to issue to the man *in transitu,* so to speak, who had been inducted but whom the Army had not accepted and did not accept. True, these men were not rejected by the Army, but most assuredly, they were never in the Army. Conse-

[12] The idea of a "Discharge from Draft" may have been derived from Section 16 of the Civil War Draft Act of March 3, 1863, c. 75, 12 Stat. 731, 734: "That as soon as the required number of able-bodied men liable to do military duty shall be obtained from the list of those drafted, the remainder shall be discharged; * * *." *Held,* not a discharge from the military service, but only a release from liability to service. Dig. Op. JAG (1912), pp. 623-624, par. 11 C.

quently, any discharge "from the Army" under par. 150, A. R. 1913, would have been inappropriate. They were accordingly issued the Discharge from Draft, and in his final report General Crowder classified the 55,855 men in this category as "rejected, cancellation of draft." *Final Report of the Provost Marshal General to the Secretary of War* (1920) 54, 55–120.

It is to be noted that Form No. 638, A. G. O., could have been used without change for the discharge of men not accepted because of the Armistice and the attendant cancellation of draft calls. And as a matter of fact, all that Form 638–1 did was to print the reason for discharge, viz., "by order of the President, dated November 11, 1918," which previously was required to be specially inserted in each instance.

The court below concluded (R. 26) that Form 638–1 depended for its validity on Circular No. 111 of December 4, 1918. But this was clearly erroneous, as the very face of the Discharge from Draft actually issued respondent (R. 17) shows that it was devised on "Nov. 19–18." All that Circular No. 111 did was to bring the change generally to the attention of the service; it did not signalize any departure from preexisting practice.

And the court below was also in error in assuming (R. 27) that par. 150 of the 1913 Army Regulations governed respondent's case. This no-

tion, that a man not accepted by the Army and never in the Army could still claim the benefit of regulations prescribing modes of separation from the Army, is the all-permeating substantive misconception of the ruling now under review.

C. IN ANY EVENT, THE SECRETARY OF WAR WAS NOT BOUND BY HIS OWN REGULATIONS SO THAT, WHEN THE ARMISTICE INTERVENED, HE WAS OBLIGED TO ISSUE AN HONORABLE DISCHARGE FROM THE ARMY TO A MAN WHO HAD NEVER BEEN IN THE ARMY

Even if we should be wrong in our view that the regulations in force on November 11, 1918, required respondent to be issued a Discharge from Draft rather than an Honorable Discharge from the Army, it still does not follow that he is entitled to prevail. For even on this assumption, the court below was still in error; it held that the Secretary of War was so far bound by his own regulations that, not having anticipated the Armistice nor the circumstances that the cessation of hostilities with Germany would result in a suspension of draft calls, he was bound to issue an Honorable Discharge from the Army to a man who had never been accepted by the Army, who had never entrained for the mobilization rendezvous, and who is careful not to allege that he even proceeded as far as the railroad station (R. 4–5).

But the law does not require the Secretary of War to have second sight. A regulation cannot "be made the basis of a proceeding in mandamus

against the Secretary. It governs his subordinates only and may be ignored by him." *Denby* v. *Berry*, 263 U. S. 29, 38; *Reid* v. *United States*, 161 Fed. 469, 472, *supra*; *Smith* v. *United States*, 24 C. Cls. 209. The Secretary of War is always free to deal with contingencies up to then unprovided for, as these may arise.

The Armistice in 1918 came unexpectedly at a time when the nation was embarking on an expanding and accelerated military program.[13] All energies were directed to mobilization. The regulations had not been drawn in contemplation of a sudden Armistice which coincided with an unusually large increase in the number of draft calls.[14] Accordingly, even if a narrow reading of the regulations would support respondent's view, he can not insist that the Secretary apply them to the

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[13] "It seems to me appropriate here to observe that the termination of the war in 1918 was to a certain extent unexpected. When I visited France in October, 1918, plans for the campaign of 1919 were still under earnest consideration. The American 80-division program was, of course, addressed to that campaign. Marshal Foch expressed confident belief in his ability to win the war in 1919, with the aid of 80 American divisions. The plans in this country, as well as those in Europe, were all made in anticipation of operations on a tremendous scale beginning in the spring of 1919.

"We had failed to realize the effect of our accelerated troop movement, both in demoralizing the enemy and in strengthening the fighting efficiency of the allied armies on the western front. * * *" *Report of the Secretary of War for the Fiscal Year 1919*, H. Doc. 426, 66th Cong., 2d sess., p. 12.

[14] "Meanwhile the prevalence of the epidemic had likewise made it necessary to suspend calls to camp. When this

present situation which was obviously not contemplated by them.

Respondent in effect claims a vested right to profit by that oversight. He contends that since no one, the Secretary of War least of all, anticipated the Armistice, that circumstance gives him a vested right to an Honorable Discharge from the Army. Otherwise stated, respondent insists that because the military authorities failed accurately to divine the future, he is entitled as a matter of law to be placed on a parity with those who were accepted by the Army and actually served, and in a more advantageous position than those who proceeded to the mobilization camp and were there rejected by the Army.

As we have shown, the Secretary of War was not straitjacketed by his own regulations. *Denby* v. *Berry*, 263 U. S. 29, 38. He had the power to make provision for the 56,000 odd men in respondent's position. He could decide, in the exercise of a sound discretion, whether a man inducted

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obstacle had passed away, the date fixed for delivery to camp by entrainment of the men called under the first substantial requisition applicable to the new registrants was Monday, November 11, 1918. On that day were ready for entrainment at their local boards the total of 140,000 men of the new registration, as well as 130,000 more men not yet requisitioned, together with some 110,000 or more of those still available from the first and second registrations. It was on that very day that the armistice was signed * * *" *Second Report of the Provost Marshal General*, p. 177.

into the military service and not accepted by the Army by reason of the cancellation of draft calls should be analogized to a man inducted and then rejected, or to a man inducted and accepted. The decision made was that non-acceptance was closer to rejection than to acceptance, that the line to be drawn was between the men in the Army and the men not in the Army. In other words, men in the Army would be separated under the provisions of par. 150, A. R. 1913, while men not in the Army would receive Discharges from Draft. We submit, therefore, that this decision represented the exercise of a sound discretion.[15]

The circumstance that respondent here was given four days' pay, covering the time from his induction until his discharge (R. 6, 19), does not, of course, establish his right to an Honorable Discharge from the Army; such pay was, under the provisions of par. 4 (b) of Circular No. 651 (*infra*, p. 63), given all men who were inducted and thereafter rejected by the Army. Nor can it be contended that his prayer for a declaratory judgment "that he served as a soldier in the Army" (R. 10) is supported by the circumstance that he

[15] This Court has quoted with approval the ruling of Judge Advocate General Holt that an honorable discharge represents "a formal final judgment passed by the government upon the entire military record of the soldier." *United States* v. *Kelly*, 15 Wall. 34, 36. And see *In re Eong Chew Chung*, 149 F. 2d 904, 906 (C. C. A. 9): "Such a certificate could not rightly be awarded one who had given no service."

was, after induction and prior to discharge, subject to military law. Article of War 2(d) of 1916[16] subjected to military law a good many civilians who never were in the Army,[17] as well as a sizable number of others who went to some pains to stay out of the Army.[18]

D. THE ISSUANCE OF DISCHARGES FROM DRAFT TO MEN WHO WERE INDUCTED BUT NEVER ACCEPTED BY THE ARMY HAS BEEN RECOGNIZED—AND PROBABLY RATIFIED—BY CONGRESSIONAL ENACTMENT

The difference between a Discharge from Draft and an Honorable Discharge from the Army has

[16] "ART. 2. PERSONS SUBJECT TO MILITARY LAW.—The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' * * * whenever used in these articles: * * *

"(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles; * * *" 39 Stat. at 651.

[17] *Ex parte Falls*, 251 Fed. 415 (D. N. J.) (civilian cook on an army transport); *Ex parte Jochen*, 257 Fed. 200 (S. D. Tex.) (civilian quartermaster superintendent); *Hines* v. *Mikell*, 259 Fed. 28 (C. C. A. 4), certiorari denied, 250 U. S. 645 (civilian auditor employed on construction of cantonment).

[18] E. g., *Ex parte Bergdoll*, 274 Fed. 458 (D. Kan.) (draft deserter); *United States ex rel. Feld* v. *Bullard*, 290 Fed. 704 (C. C. A. 2), certiorari denied, 262 U. S. 760 (same); *United States ex rel. Bergdoll* v. *Drum*, 107 F. 2d 897 (C. C. A. 2), certiorari denied, 310 U. S. 648 (same).

been recognized and acquiesced in by Congress. In the circumstances we venture to suggest that such recognition amounts to a legislative ratification of what was done in the present case.

Section 202 of the World War Adjusted Compensation Act (Act of May 19, 1924, c. 157, 43 Stat. 121, 122–123; 38 U. S. C. 602) provides in part as follows:

> SEC. 202. In computing the adjusted service credit no allowance shall be made to—
>
> * * * * *
>
> (i) Any individual who was discharged or otherwise released from the draft—for the period of service terminating with such discharge or release.

Such legislative history as there is indicates that Section 202 (i) was inserted to cover the cases of those who "really did not render such service as would entitle them to compensation." 65 Cong. Rec. 6712; and see H. Rep. 624, 68th Cong., 1st sess., pp. 1, 4.

But, while the holder of a Discharge from Draft was not entitled to the bonus, he was given the same rights to disability compensation (and, in some instances, to insurance) that were accorded the men who received Honorable Discharges. Section 24 of the World War Veterans' Act, 1924 (Act of June 7, 1924, c. 320, 43 Stat. 607, 614; 38 U. S. C. 448) provides as follows:

> * * * if after induction by the local draft board, or after being called into Federal service as a member of the National Guard, but before being accepted and enrolled for active service, the person died or became disabled as a result of disease contracted or injury suffered in the line of duty and not due to his own willful misconduct involving moral turpitude, or as a result of the aggravation, in the line of duty and not because of his own willful misconduct involving moral turpitude, of an existing disease or injury, he or those entitled thereto shall receive the benefits of compensation payable under Title II; and any insurance application made by such person after induction by the local draft board but before being accepted and enrolled for active service shall be deemed valid.[19]

These provisions certainly amount to a legislative recognition of the propriety of the War Department's differentiation between men who simply reported for induction and men who were accepted by the Army. They may well amount to a ratification of what was done in 1918–1919. Certainly they emphasize the essential soundness of petitioners' refusal (R. 9) to issue an Honorable Discharge from the Army to a man in respondent's position.

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[19] And see Section 25 of the same Act, 38 U. S. C. 449, granting the same benefits to men provisionally accepted for enlistment or enrollment.

II

SINCE THE FORM AND CHARACTER OF DISCHARGES FROM THE MILITARY SERVICE ARE DISCRETIONARY, THESE MATTERS CAN NOT BE CONTROLLED BY MANDATORY INJUNCTION

A. THE TYPE OF A DISCHARGE FROM THE ARMED FORCES HAS ALWAYS BEEN HELD TO BE NOT REVIEWABLE BY THE COURTS

We have already pointed out above, pp. 13–14, that the courts have never undertaken to review the actions of the armed forces in respect of the form and character of discharges issued upon separation from the service, regardless of the nature of the remedy sought or the person against whom relief was requested. As the court below stated in an earlier case (*Davis* v. *Woodring*, 111 F. 2d 523, 525, *supra*):

> * * * Congress having failed to prescribe the form of discharge and having left it to the discretion of the President acting through the Secretary, we are wholly without any effective power of review.

Or, otherwise stated, "The power to discharge * * * is vested in the commanding officer of the Army and an order of discharge emanating from the Secretary of War or the commanding officer of a department is not subject to review by the courts." *Nordmann* v. *Woodring*, 28 F. Supp. 573, 575, *supra*. Relief will not be granted even when there has been a violation

of the applicable regulations; the only inquiry is whether there has been compliance with the statute. *Palmer* v. *United States,* 72 C. Cls. 401.

In that case, Palmer had enlisted in the Coast Guard, but had been discharged by the captain of his ship, before expiration of his enlistment, in violation of the provision of the applicable regulations. He thereupon brought suit for back pay for the unexpired portion of his enlistment, alleging that the discharge was invalid because not effected as provided in the regulations. The Court of Claims denied recovery, saying (72 C. Cls. at 405–406):

> * * * Any regulation that the Secretary [of the Treasury] may have made could be set aside by him at any time and a new and different one promulgated * * *.
>
> * * * * Nothing is expressed in the enlistment papers of plaintiff as to what reasons shall be sufficient for a discharge, nor is there anything that would indicate that he could only be discharged in accordance with certain regulations made by the Treasury Department. If the commanding officer of plaintiff failed to observe some regulation made by the Treasury in making the discharge, he could be called to account by the Secretary of the Treasury should that official see fit. But as long as no statute was violated by the manner of plaintiff's discharge, the fact that it was not in ac-

cordance with some Treasury directions can not, in our opinion, avail him.

* * * It appears to be well settled not only by court decisions but by an unbroken practice in the military service which dates back to a time long preceding the organization of our Government that the courts will not interfere with or review the actions of proper officers in the military forces done in some administrative proceeding and not in conflict with any statute.

B. SINCE THE CHARACTER OF DISCHARGE TO BE GIVEN ON SEPARATION WAS DISCRETIONARY, IT COULD NOT, UNDER SETTLED PRINCIPLES, BE CONTROLLED BY MANDAMUS

The error of the court below in undertaking to "interfere with or review the actions of proper officers in the military forces done in some administrative proceeding and not in conflict with any statute" is highlighted by the circumstance that what is here involved is an action for a mandatory injunction. Accordingly, there is brought into play the firmly established rule that decisions of administrative officers, where they involve an exercise of discretion and insofar as they are not unreasonable or plainly wrong, will not be reversed or set aside by process in the nature of mandamus. The rule has been consistently applied by this Court, regardless of the label attached to the plaintiff's pleading,[20] and regardless

[20] The mandatory injunction here sought is in substance and effect the precise equivalent of a writ of mandamus, and its issuance is governed by identical considerations. *Gaines*

of the office held by the defendant. We cite only a few of the leading cases. *Litchfield* v. *Register and Receiver,* 9 Wall. 575 (local land officers); *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316 (Secretary of the Interior); *Wilbur* v. *United States,* 281 U. S. 206 (same); *Denby* v. *Berry,* 263 U. S. 29 (Secretary of the Navy); *French* v. *Weeks,* 259 U. S. 326 (Secretary of War); *United States* v. *Lynch,* 137 U. S. 280 (Fourth Auditor and Second Comptroller); *United States ex rel. Girard Co.* v. *Helvering,* 301 U. S. 540 (Commissioner of Internal Revenue); *Interstate Commerce Commission* v. *United States,* 289 U. S. 385 (Interstate Commerce Commission).

The function of a writ of mandamus was summarized by Mr. Justice Van Devanter, speaking for the Court in *Wilbur* v. *United States,* 281 U. S. 206, in the following terms (pp. 218–219):

> Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.
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> The duties of executive officers, such as

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v. *Thompson,* 7 Wall. 347, 352; *Miguel* v. *McCarl,* 291 U. S. 442, 452; cf. *Warner Valley Stock Co.* v. *Smith,* 165 U. S. 28, 33.

> the Secretary of the Interior, usually are connected with the administration of statutes which must be read and in a sense construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.

It is clear that in this case the Secretary of War did not have in 1918–1919 a plain ministerial duty, equivalent to a positive command, to issue to respondent an Honorable Discharge from the Army, he never having been accepted by the Army. And it is clear *a fortiori* that neither the present petitioners nor their immediate predecessors in office had a plain ministerial duty, equivalent to a positive command, to issue to respondent in 1943 and thereafter a form of discharge different from that given him in 1919, and which

neither he nor any of the thousands of other men similarly situated had ever questioned in the intervening years.

C. THE FOREGOING RULE APPLIES WITH PARTICULAR FORCE TO MATTERS INVOLVING THE ADMINISTRATION OF THE ARMED FORCES

The rule that discretionary action on the part of executive officers acting within the scope of their statutory authority will not be controlled by the courts has particular force as applied to the military establishment; and this Court has repeatedly refused to sanction judicial intrusion into the realm of ordinary military and naval administration. "To those in the military or naval service of the United States the military law is due process." *Reaves* v. *Ainsworth,* 219 U. S. 296, 304.

In that case, where a former Army officer sought a writ of certiorari in the District of Columbia courts to review the proceedings of an Army promotion board finding him not qualified for promotion, and to annul an order made by the President discharging him from the Army, the proceedings were held to be not subject to review by the courts. This Court said (219 U. S. at 306):

> * * * The courts have no power to review. The courts are not the only instrumentalities of government. They cannot command or regulate the army. * * * If it had been the intention of Congress to

> give an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion and carry them over the head of the President to the courts, and there litigated, it may be, through a course of years, upon the assertion of error or injustice in the board's rulings or decisions, such intention would have been explicitly declared. The embarrassment of such a right to the service, indeed the detriment of it, may be imagined.

In *French* v. *Weeks,* 259 U. S. 326, and *Creary* v. *Weeks,* 259 U. S. 336, judicial relief by way of mandamus was sought against the Secretary of War by officers formerly on the active list of the Army to annul orders issued by the Secretary under Section 24b of the National Defense Act (Act of June 4, 1920, c. 227, 41 Stat. 759, 773; 10 U. S. C. 571), in one case retiring the relator and in the other discharging him from the Army. In both cases the Court held that the trial court "did not have jurisdiction to order the writ of mandamus prayed for." 259 U. S. at 336, 344.

In *Denby* v. *Berry,* 263 U. S. 29, an officer of the Naval Reserve Force petitioned for a writ of mandamus to compel the Secretary of the Navy to revoke an order directing the relator's release from active service in the Navy and to compel the Secretary to order him before a retiring board. A board of medical survey had found that relator was under permanent disability incurred in line

of duty, not the result of his own misconduct, and had recommended that he be sent before a retiring board. The Secretary of the Navy disapproved this recommendation and directed that "this officer be ordered to proceed to his home and be released from active duty." The Bureau of Navigation (the present Bureau of Naval Personnel) accordingly advised the relator that "you are hereby detached from such duty as may have been assigned you; you will proceed to your home and regard yourself honorably discharged from active service in the Navy." The relator wrote the Secretary requesting that his case be referred to a retiring board for consideration, and, upon the Secretary's refusal, brought suit. The Court of Appeals modified but affirmed a judgment awarding the writ. *Denby* v. *Berry,* 279 Fed. 317 (App. D. C.). It construed the order of the Bureau of Navigation as a "general discharge", and held that mandamus will "lie to correct the wrong inflicted upon the plaintiff, and to compel the vacation of the orders. This will, of course, operate to reinstate plaintiff to his full standing as a Naval Reserve Officer" (279 Fed. at 329).

This Court reversed the judgment, holding that mandamus would not lie since the matters in controversy all rested in the discretion of the Secretary of the Navy. Chief Justice Taft said (263 U. S. at 33–34):

> * * * Orders releasing individuals from active service and putting them on in-

active duty were clearly within the power of the President and of the Secretary of the Navy acting for him in the administration of the act. Nowhere is there found any limitation upon the discretion of the Executive in this regard. The orders in such cases were in the nature of military orders by the Commander-in-Chief in the assignment or withdrawal of available forces to or from duty for the good of the service. Such orders of withdrawal could not and did not make members of the Naval Reserve Force civilians. They did not release them from obligation under their enrollment to render active service again when ordered to do so by the proper authority. When the Bureau of Navigation detached relator from active duty and told him to go home and regard himself as honorably discharged from active service in the Navy, he was not ousted from the Naval Reserve Force or the Navy. The words "honorably discharged" were only to advise him and others that the change of his status from active to inactive duty was not because of his fault or misconduct.

Here, similarly, the Discharge from Draft carried no stigma of fault or misconduct on respondent's part. All that happened was that the Secretary of War, in the exercise of his discretion, determined that men drafted but not accepted for the Army should be treated on a parity with men drafted but rejected by the

Army; that such men should not be discharged from the Army, since they never were in the Army; and that Par. 150 of the Army Regulations of 1913 should be construed as applicable only to men actually in the Army. That determination, as we have shown in some detail above, pp. 23–27, was neither arbitrary, capricious, nor plainly wrong. The only statute involved—the 108th Article of War—did not purport to direct the Secretary of War to issue either a particular kind of discharge or a particular form of discharge certificate. Consequently the case, on this analysis also, falls within the unquestioned rule that neither the writ of mandamus nor a mandatory injunction is available to compel an executive officer to exercise his judgment and discretion in a particular way. "Where there is discretion, * * * even though its conclusion be disputable, it is impregnable to mandamus." *Alaska Smokeless Coal Co.* v. *Lane,* 250 U. S. 549, 555.

D. THE FOREGOING RULES ARE NOT CHANGED BY ANYTHING IN THE ADMINISTRATIVE PROCEDURE ACT, IF INDEED ITS PROVISIONS ARE APPLICABLE TO THE PRESENT PROCEEDING

The judgment below was entered on March 25, 1946 (R. 29). Nearly two and a half months later, on June 11, 1946, the President approved the Administrative Procedure Act (Public Law 404, 79th Cong., 2d sess.), which in Section 12 provides among other things that

> This Act shall take effect three months after its approval except that sections 7 and 8 [Hearings, Decisions] shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

The only section which could conceivably apply here would be Section 10—Judicial Review—which became effective September 11, 1946. For the reasons pointed out below, pp. 42–46, we do not believe that this section was intended to change the scope of review applicable to a case such as the present one, nor to abrogate or limit the rules just discussed. But, in any event, and regardless of the scope of Section 10, we believe that its provisions are not and were not intended to apply to pending proceedings.

Neither in the Act nor its legislative history is there any reference to judicial proceedings seeking review of administrative action which had already been commenced. There is, throughout the legislative history, evidence of intent to afford the various agencies ample time to prepare and make such adjustments in their procedure as the provisions of the Act may require, H. Rep. 1980, 79th Cong., 2d sess., p. 47; S. Rep. 752,

79th Cong., 1st sess. p. 30, and this intent is underscored by the portions of Section 12 quoted above.

It would be anomalous to suppose that Congress intended to make a procedural requirement of the Act inapplicable to an administrative proceeding initiated before the effective date of the requirement but applicable to a judicial proceeding concluded in the lower courts before the effective date of the requirement.[21]

It is not necessary in this case to determine the precise point at which Section 10 would apply. It is sufficient to note that to have that section apply, as here, at some appellate stage of a pending proceeding, would not make for certainty or stability of administrative action, and would be productive only of confusion. While undoubtedly Congress had the power to change the scope of judicial review so as to affect pending proceedings, even at the ultimate appellate stage, the consequences of such a change would be so unsettling that clear and unmistakable evidence of an intention to effect that result should be required. Here there is no such evidence. Accordingly, it seems clear that the provisions of Section 10, which went into effect on September 11, 1946, were, at the very least, not intended to affect the scope of judicial

[21] The general principle that statutes are not to be construed retrospectively, see *United States* v. *Heth*, 3 Cranch 399, 413, is applicable also to statutes governing procedure. E. g., *United States* v. *St. Louis, etc., Ry. Co.*, 270 U. S. 1, 3.

review in proceedings in which certiorari had been applied for well before that date. *Semble accord, United States* v. *Ruzicka*, No. 54, this Term, decided December 16, 1946.

In any event, the terms and legislative history of the Administrative Procedure Act make it abundantly clear that Section 10 was designed, in general, to restate existing law, and that there was no disposition on the part of the Act's sponsors to change the well settled rule, *supra*, pp. 35–39, that decisions of the Secretary of War relating to military administration which are not shown to be plainly in violation of statute law, will not be set aside by the courts by process in the nature of mandamus.

The general legislative history of the Administrative Procedure Act is set out in S. Doc. 248, 79th Cong., 2d sess., and will not be repeated here. See also 14 U. S. Law Week 2709–2728.

Section 10 expressly excepts judicial review where "(2) agency action is by law committed to agency discretion." We think that the plain terms of the 108th Article of War bring the present case within this exception, and that accordingly it is unnecessary to argue at length the inapplicability of the remainder of the section.

Generally, most contemporaneous comments stress that the bill did not change existing law as to the scope of judicial review. The original draft of Section 10, prepared by the American Bar Association's Committee on Administrative

Law, carried the comment that it did not attempt to expand the scope of judicial review. 30 A. B. A. J. 46.[22] The Attorney General advised the Senate Judiciary Committee that Section 10, "in general, declares the existing law concerning judicial review" (S. Rep. 752, 79th Cong., 1st sess., p. 43), a view to which he consistently adhered. See his memorandum (92 Cong. Rec. A3154), which states:

> Section 10 as to judicial review does not, in my view, make any real changes in existing law. This section in general declares the existing law concerning judicial review. It is an attempt to restate in exact statutory language the doctrine of judicial review as expounded in various statutes and as interpreted by the Supreme Court. I know that some agencies are quite concerned about the phraseology used in section 10 for fear that it will change the existing doctrine of judicial review which has been settled for the particular agency concerned. I feel sure that should this section be given the interpretation which is intended, namely, that it is merely a restatement of existing law, there should be no difficulty for any agency. We may in a sense look at section 10 as an attempt by Congress to place into statutory language existing methods of review.

And see also S. Rep. 752, 79th Cong., 1st sess.,

[22] And see Hearings before the House Committee on the Judiciary on H. R. 1203, 79th Cong., 1st sess., p. 38.

pp. 43-44, quoting from another statement of the Attorney General:

> Section 10. This section, in general, declares the existing law concerning judicial review. It provides for judicial review except insofar as statutes preclude it, or insofar as agency action is by law committed to agency discretion. A statute may in terms preclude judicial review or be interpreted as manifesting a congressional intention to preclude judicial review. Examples of such interpretation are: *Switchmen's Union of North America* v. *National Mediation Board* (320 U. S. 297); *American Federation of Labor* v. *National Labor Relations Board* (308 U. S. 401); *Butte, Anaconda and Pacific Railway Co.* v. *United States* (290 U. S. 127). Many matters are committed partly or wholly to agency discretion. Thus, the courts have held that the refusal by the National Labor Relations Board to issue a complaint is an exercise of discretion unreviewable by the courts (*Jacobsen* v. *National Labor Relations Board*, 120 F. (2d) 96 (C. C. A. 3d); *Marine Engineers' Beneficial Assn.* v. *National Labor Relations Board*, decided April 8, 1943 (C. C. A. 2d), certiorari denied, 320 U. S. 777). In this act, for example, the failure to grant a petition filed under section 4 (d) would be similarly unreviewable.

In view of this legislative history, and in view of the circumstance that nothing in the language of Section 10 indicates any intention to interfere

with the exercise of a discretionary power vested by law in any agency, we think it plain that Congress did not intend to disturb the settled rule discussed at length above, pp. 35–39, which renders the decisions of the Secretary of War in the course of administering the military establishment, decisions made by him within the scope of the statutory discretion vested in him by Congress—in this case, within the limits of the 108th Article of War—immune from judicial review. From *Decatur* v. *Paulding*, 14 Pet. 497, decided at the January Term, 1840, through *Denby* v. *Berry*, 263 U. S. 29, decided at the October Term, 1923, this Court has steadfastly refused to permit the judiciary to relieve the Secretaries concerned from their direction of and command over, as *alter ego* of the Commander-in-Chief, the Army or the Navy.[23] Certainly if Congress had intended by passing the Administrative Procedure Act to invest the federal courts with the power of judicial review over the normal incidents of military and naval administration, apt language to do so could easily have been fashioned and would certainly have been used. The circumstance that neither the rule as to the scope of relief in the

[23] In *Miguel* v. *McCarl*, 291 U. S. 442, relied upon by the court below (R. 27), the War Department agreed with the petitioner, and, together with the Solicitor General, contended that "The Comptroller General's duty was purely ministerial and his refusal to follow the plain mandate of the statute may be coerced in mandamus or in equity. His attempted exercise of discretion in a field in which he had no discretion can not serve to shield him from these remedies." 291 U. S. at 448; see also p. 450.

nature of mandamus nor the rule as to the non-reviewability of action pertaining to military and naval administration was referred to, seems to us proof positive, in the face of the language and legislative history of the Administrative Procedure Act, that no change in either was intended to be made. Consequently, without at this time inquiring whether, in other respects, the Act may have contemplated some slight alterations in the scope of judicial review in other connections, we assert with confidence that, as to the rules discussed in the present brief, no changes whatever were either effected or intended to be effected.

Indeed, as Sections 131 and 207 of the Legislative Reorganization Act of 1946, *supra* p. 15, indicate, the tendency of Congress is to withdraw entirely from the field of routine military administration, and to leave to the Departments concerned a matter which has traditionally been the subject of legislative action in the past, namely, the correction of military and naval records.

E. THE CIRCUMSTANCE THAT A DISCHARGE FROM DRAFT HAS BEEN TREATED BY CONGRESS AND SOME STATE COURTS AS BEING EQUIVALENT, IN SOME CASES, TO AN HONORABLE DISCHARGE, IS FAR FROM SUPPORTING THE VIEW THAT THE SECRETARY OF WAR CAN BE COMPELLED TO ISSUE THE LATTER TO A MAN WHO RECEIVED ONLY THE FORMER

We have already pointed out, *supra*, pp. 27–29, that Congress in 1924 recognized the difference between a Discharge from Draft and an Honorable Discharge from the Army, and that while it denied Adjusted Compensation to the holder of

the former, it did accord him rights to disability compensation and to insurance.

A similar diversity of treatment is reflected in the rulings of federal law and accounting officers, though it may be said that the trend seems to be unfavorable to men simply discharged from the draft. The Comptroller General held (7 Comp. Gen. 570) that a deceased holder of a Discharge from Draft was not entitled to burial at public expense as a "veteran of any war" within the meaning of Section 201 (1) of the World War Veterans' Act, as amended (38 U. S. C. 472). The Attorney General recently held (40 Op. A. G., No. 103) that a person inducted by a local board on November 11, 1918, and discharged two hours later by the cancellation of all draft calls did not serve "on active duty" within the contemplation of the Veterans' Preference Act of 1944, Act of June 27, 1944, c. 287, 58 Stat. 387, 5 U. S. C., Supp. V, 851–869.[24] And, while the Comptroller of the Treasury, following The Judge Advocate General of the Army, had early ruled (25 Comp. Dec. 771; 26 Comp. Dec. 57) that a Discharge from Draft entitled the holder to payment of the $60 mustering-out bonus authorized by Sec. 1406 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1151, the Comptroller General refused to follow those decisions and held the contrary (1 Comp. Gen. 379).

[24] Distinguish the situation where the Discharge from Draft is not delivered, and the person for whom it is intended in fact performs military service before his separation. Dig. Op. JAG (1912–40), par. 466 (3) (3), p. 379.

Similar differences of opinion as to the effect to be accorded a Discharge from Draft are reflected by the rulings of state courts; but those differences, for the most part, turn on the terms of the state statutes involved rather than on whether the Discharge from Draft was issued because of rejection for physical disqualification or by reason of the cancellation of draft calls.

Four states hold that the Discharge from Draft is not the equivalent of an Honorable Discharge, and does not entitle its holder to the statutory benefits conferred upon honorable discharged veterans. *Bannister* v. *Soldiers Bonus Board,* 43 R. I. 346 (eligibility for bonus); *Zearing* v. *Johnson,* 10 Cal. App. 2d 645 (right to tax exemption); *Lamb* v. *Kroeger,* 233 Iowa 730 (same); *Dunn* v. *Commissioner of Civil Service,* 281 Mass. 376 (veterans' civil service preference). New York and the court below have held the contrary with respect to veterans' civil service preferences. *Matter of Lore* v. *Forbes,* 173 Misc. 1066, affirmed, 259 App. Div. 806; *Matter of Donohue* v. *Huie,* 259 App. Div. 645, affirmed, 285 N. Y. 557; *Hurley* v. *Crawley,* 50 F. 2d 1010 (App. D. C.).

These cases, and the federal administrative rulings, obviously turn on the precise terms of the state and federal statutes involved. They decide nothing as to the particular person's right to a particular kind of discharge. Indeed, in view of the statement of the Iowa court in respondent's case (*Lamb* v. *Kroeger, supra,* 233

Iowa at 734), that it was only "concerned with what the Iowa Legislature, not draft-law administrators, or United States Government officials, meant by the term 'honorably discharged soldier * * * of the war with Germany'," it may well be that he would have failed to obtain the desired tax exemption even on the basis of the ruling below. Here, however, we are concerned with his federal status, more particularly his status *vis-à-vis* the War Department.

The fact that the two types of discharges may or may not carry identical benefits is far from proving that the holder of one has a right to be issued the other. For, whatever else respondent may be entitled to by reason of his induction on November 11, 1918, it is clear on the authorities discussed above, pp. 13–14, 30–32, that he is not entitled to have the courts compel the Secretary of War and The Adjutant General, U. S. Army, to issue him an Honorable Discharge. Indeed, as we have already suggested (*supra,* pp. 27–29), the action of the military authorities in this case is not only unassailable as an original question and in view of the nature of the remedy sought, it is probably fortified by legislative ratification; Congress in enacting the cited Acts in 1924 recognized the Discharge from Draft, and specifically provided in what instances it should, and in what it should not, entitle its holder to the benefits conferred on persons having Honorable Discharges.

III

IN ANY EVENT, RESPONDENT'S CLAIM IS NOW BARRED BY LACHES

More than a quarter of a century after respondent had received a certificate headed "Discharge from Draft" in large and unmistakable capital letters (R. 17), he brought the present action to compel the Secretary of War and the Adjutant General of the Army to issue to him a certificate of "Honorable Discharge from the United States Army". Even if respondent's claim had any vestige of merit as an original proposition, it is now barred by laches.

The doctrine of laches "is based upon grounds of public policy, which require, for the peace of society the discouragement of stale demands." *Mackall* v. *Casilear*, 137 U. S. 556, 566. "A neglected right, if neglected too long, must be treated as an abandoned right which no court will enforce"; there "always comes a time when the best of rights will, by reason of neglect, pass beyond the protecting reach of the hands of equity." *Moran* v. *Horsky*, 178 U. S. 205, 208. Over twenty-five years' delay in resorting to the courts is obviously unreasonable.[25]

[25] It may be significant in this connection that the review of discharges authorized by Section 301 of the Servicemen's Readjustment Act of 1944, 38 U. S. C., Supp. V, 693h, is, by the terms of that provision, barred after fifteen years.

And, while the statute of limitations relating to actions at law does not apply to mandamus proceedings of its own force, see *Arant* v. *Lane*, 249 U. S. 367, 371–372, it is well settled that the doctrine of laches does. *Arant* v. *Lane*, *supra*; cf. *Matter of Eastern Cherokees*, 220 U. S. 83. As was pointed out in the *Arant* case (249 U. S. at 371):

> This court has lately said that while mandamus is classed as a legal remedy, it is a remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion and upon equitable principle, *Duncan Townsite Co.* v. *Lane*, 245 U. S. 308. It is an extraordinary remedy, which will not be allowed in cases of doubtful right, *Life & Fire Insurance Co.* v. *Wilson*, 8 Pet. 291, 302, and it is generally regarded as not embraced within statutes of limitation applicable to ordinary action, but as subject to the equitable doctrine of laches. *Chapman* v. *County of Douglas*, 107 U. S. 348, 355; *Duke* v. *Turner*, 204 U. S. 623, 628.

Accordingly, relatively short delays, far less than that here involved, have been held to bar actions for mandamus, both here and in the court below. *Arant* v. *Lane*, *supra* (twenty months); *Caswell* v. *Morgenthau*, 98 F. 2d 296 (App. D. C.), certiorari denied, 305 U. S. 596 (eighteen months); *United States ex rel. Cromwell* v. *Doyle*, 99 F. 2d 448 (App. D. C.), certiorari denied, 306 U. S. 640 (thirty months).

The court below rejected the defense of laches on the ground that only a mere matter of time was involved here. It said (R. 28):

> * * * Although the appellant was discharged on November 14, 1918, and received a certificate of Discharge from Draft on January 26, 1919, he was told on November 15, 1918, by his local board that the Presidential order of November 11, 1918, discharging from the army all registrants who had been inducted but not entrained, had "the effect of an honorable discharge from the army." Until 1941, the appellant had no basis for supposing that there was any doubt concerning his status as an honorably discharged soldier. When that status was challenged for the first time, he manifested extraordinary diligence in asserting his rights. Moreover, the appellees do not claim that there has been any change of condition or relations since 1918 because of which it would be an injustice to them to permit the appellant to assert his rights now. * * *

The assumptions on which this ruling rests are demonstrably incorrect. It must be obvious that the notice from the local draft board (R. 15), could not bind the Secretary of War, by some species of informal and inarticulate estoppel, as to the type of discharge which he should issue to persons in respondent's situation, the more so since that board had been specifically advised by

the Provost Marshal General, announcing the cancellation of all draft calls, that (R. 16) "The issue of formal papers of discharge will be considered and determined later * * *." In any event, the court below misinterpreted the words in the draft board's notice, "has the effect of an honorable discharge". A similar error on its part led to reversal in *Denby* v. *Berry*, 263 U. S. 29, discussed *supra*, pp. 36–38, where Chief Justice Taft pointed out (263 U. S. at 34) that—

> * * * The words "honorably discharged" were only to advise him and others that the change of his status from active to inactive duty was not because of his fault or misconduct.

Nor is there any support for the statement of the court below that until the decision of the Supreme Court of Iowa in *Lamb* v. *Kroeger*, 233 Iowa 730, respondent "had no basis for supposing that there was any doubt concerning his status as an honorably discharged soldier."

That decision disclosed no fact hitherto unknown; it dealt solely with the construction of a state statute granting a tax exemption. As we have already pointed out, *supra*, pp. 4–5, the Iowa court reached that construction as a matter of state law, following a ruling of the Attorney General of Iowa made in 1922, and in express disregard of what respondent's status might be as a matter of federal law.

It is respondent's dissatisfaction with the Iowa court's interpretation of Iowa law which has occasioned the present proceeding. But the certificate issued to respondent in 1919 shows on its face what it purported to be, a Discharge from Draft and not an Honorable Discharge from the United States Army. If, as he now contends, the issuance of the certificate he received was in violation of existing regulations, it must follow that he was chargeable in 1919 with the distinction between what he received and what he now contends was required by those regulations. We have cited and discussed above, pp. 46–49, the numerous state court decisions and federal rulings turning on that difference, most of which antedate *Lamb* v. *Kroeger*. But whether or not respondent is bound at his peril to know the law, certain it is that the distinction between persons discharged from draft and persons honorably discharged from the Army was created neither by the Iowa Supreme Court in 1943 nor by the Attorney General of Iowa in 1922.

We submit that respondent's claim is a stale one, which no court should enforce.

One further thought may not be inappropriate in connection with the present proceeding.

Over a century ago, Chief Justice Taney, speaking for the Court, observed that "The interference of the courts with the performance of the ordinary

duties of the executive departments of the government, would be productive of nothing but mischief; and we are satisfied, that such a power was never intended to be given to them." *Decatur* v. *Paulding*, 14 Pet. 497, 516, quoted with approval in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 131–132.

Brief examination of the potential consequences of the ruling below underscores the prophetic nature of the utterance just quoted.

There were 55,855 inducted individuals who were not accepted by the Army because of the cancellation of draft calls when the Armistice was signed; and an additional 194,385 men were rejected at the mobilization camps for physical and other reasons.[26] Of the men in respondent's situation, the best actuarial estimate now available is that somewhat over 45,000 are still alive. If the decision below remains undisturbed, then this large group (and the next of kin of those deceased) would be able to claim very substantial benefits, benefits which Congress up to now has advisedly withheld from them.[27]

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[26] *Final Report of the Provost Marshal General*, p. 54.

[27] (a) Mustering out bonus under Section 1406 of the Revenue Act of 1918; see p. 47, *supra*.

(b) Funeral expenses under 38 U. S. C. 472; see p. 47, *supra*.

(c) Adjusted Compensation under the 1924 Bonus Act; see p. 28, *supra*.

(d) Burial in national cemeteries. Par. 8, Army Regulations 30–1840, dated October 9, 1944. Reburial of those deceased might be involved.

Such a far-reaching unsettling of military and fiscal administration nearly a generation after the close of the conflict involved is a factor to be considered in determining whether respondent's delay constituted laches. Cf. *Matter of Eastern Cherokees*, 220 U. S. 83; *Hayward* v. *National Bank*, 96 U. S. 611.

Here, as in *Decatur* v. *Paulding*, 14 Pet. 497, 516, which involved the administration of the pension fund, the issuance of relief in the nature of mandamus would result in "the greatest confusion and disorder." Consequently the case falls within the rule enunciated by Mr. Justice Brandeis in *Duncan Townsite Co.* v. *Lane*, 245 U. S. 308, 311–312, that

> Mandamus * * * issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief or will be within the strict letter of the law but in disregard of its spirit.

Even if there were no other reason for denying respondent's request, it is submitted that the "confusion and disorder" which would be caused if his request were granted "renders the application of the doctrine of laches to his case peculiarly appropriate in the interests of justice and sound public policy." *Arant* v. *Lane*, 249 U. S. 367, 372.

Considering all the circumstances of the case, we submit that a sound and informed judicial discretion requires that, wholly apart from its merits or demerits, respondent's claim be now rejected because of his laches.

CONCLUSION

The judgment below should be reversed, with instructions to reinstate the judgment of the district court.

Respectfully submitted.

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APPENDIX

1. The 108th Article of War of 1916 (Act of August 29, 1916, c. 418, 39 Stat. 619, 668) is as follows:

> ART. 108. SOLDIERS—SEPARATIONS FROM THE SERVICE.—No enlisted man, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, signed by a field officer of the regiment or other organization to which the enlisted man belongs or by the commanding officer when no such field officer is present; and no enlisted man shall be discharged from said service before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court martial.

2. The Administrative Procedure Act, Public Law 404, 79th Cong., 2d sess., provides in pertinent part as follows:

> JUDICIAL REVIEW
>
> SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute, or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to juridicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irrep-

arable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

* * * * *

CONSTRUCTION AND EFFECT

SEC. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

3. Paragraph 150 of the Army Regulations of 1913, corrected to April 15, 1917, was as follows:

"150. Blank forms for discharge and final statements will be furnished by The Adjutant General's Department and will be retained in the personal custody of company commanders. Discharge certificates will be used in the discharge of enlisted

men and for no other purpose, and will be of three classes: For honorable discharge, for discharge, and for dishonorable discharge.

They will be used as follows:

1. The blank for honorable discharge, when the soldier's conduct has been such as to warrant his reenlistment and his service has been honest and faithful.

2. The blank for dishonorable discharge, for dishonorable discharge by sentence of a court martial or a military commission.

3. The blank for discharge when the soldier is discharged except as specified under sections 1 and 2 of this paragraph (C. A. R. Nos. 14 and 34).

4. War Department Circular No. 651, dated January 12, 1918, provided as follows:

PREPARATION AND DISPOSITION OF THE INITIAL RECORDS OF MEN INDUCTED INTO THE NATIONAL ARMY

1. Circular of instructions to Mustering Officers and Medical Examiners at National Army Mobilization Camps, from this office, dated August 28th, 1917, and telegram of November 12th, 1917, supplementing same, are rescinded and the following instructions for the preparation and disposition of the initial records of men inducted into the military service under the Selective Service Regulation, are substituted therefor.

2. *Initial records of accepted men:*

The following individual records of enlisted men accepted for military service at place of mobilization will be forwarded to The Adjutant General of the Army as soon as completed. (See paragraph 12.)

(a) Enlisted men and Assignment Card, Form No. 22–2, A. G. O. (No oath of enlistment is required).

(b) Report of physical examination, Form No. 1010, P. M. G. O.

(c) Identification Record Card, Form No. 260 A. G. O. (Photographs and photographic negatives are not required).

3. *Records of rejected men:*

The following individual records of enlisted men rejected for military service at place of mobilization, will be forwarded to The Adjutant General of the Army, as soon as practicable.

(a) Report of Physical Examination, Form No. 1010 P. M. G. O.

(b) *A true copy* of the certificate of discharge from draft, Form No. 638 A. G. O.

4. *Disposition of rejected men:*

All men rejected for military service at place of mobilization will be furnished the following:

(a) A discharge from draft on Form No. 638, A. G. O.

(b) Final statements. (The rejected man is entitled to pay from date of reporting for military duty to date of discharge, less pay for any time absent without leave, or absent in desertion, or any amount due United States for reward paid for apprehension and delivery of deserter, etc., and to travel allowances at the rate of 3½ cents per mile from place of discharge to place of reporting for military duty).

5. *Discharges under section 51 Selective Service Regulations:*

Men charged with desertion delivered to local boards and found by local boards to be disqualified for military service because of physical unfitness or being alien enemies,

will be reported to the proper mobilization camp commanders by local boards and the camp commanders upon the evidence submitted by the local boards are authorized to discharge or give instructions as to disposition of such men, and in each case of discharge, the following will be furnished:

(a) A discharge from draft on Form No. 638, A. G. O, completed, dated and signed, to be forwarded to the man through the local board, making the report.

(b) *A true copy* of each discharge from draft so given, to be forwarded to the Adjutant General of the Army.

6. *Discharges under sections 137, 138 and 139. Selective Service Regulations:*

When the commanding officer of a mobilization camp orders a discharge under sections 137, 138 or 139 Selective Service Regulations, he will in each case furnish the following:

(a) A discharge from draft on Form No. 638, A. G. O., completed, dated and signed, to be forwarded to the man through the state Adjutant General making the report.

(b) *A true copy* of each discharge from draft, so given, to be forwarded to The Adjutant General of the Army.

7. *Certificates of disability:*

Certificates of disability will not be given in cases of men *rejected* for military service on account of physical unfitness.

8. *Initial muster rolls:*

Initial muster rolls are not required.

9. *Pay and allowances:*

Only the pay and allowances given in cases enumerated above are authorized for men discharged as herein provided.

10. *Service records:*

The service record will be prepared as directed in the instructions thereon with the following exceptions:

(a) The form for Report of Assignment in the service record, will be detached and destroyed in all cases in which the assignment is reported on the Enlistment and Assignment Card, and the words "Assignment reported on enlistment and assignment card" will be noted on stub of Report of Assignment in lieu of the date of mailing report.

(b) When assignment is reported on the form for Report of Assignment in the service record, the line "Who was accepted for enlistment at ----------" will be stricken out.

(c) The line "Accepted for enlistment at ----------" on page 3 of the service record, will be stricken out as it is not applicable to enlistment in the National Army.

(d) If the soldier reported for military duty on the date and at the place specified in notice from the local board, the words "Reported same date and place" will be entered on page 3 of the Service record immediately below the line "Enlisted------ 191--, at ----------" otherwise the date and place of reporting will be stated.

11. *Registration cards and reports of physical examination:*

Registration cards will be filed until further orders with the records of the headquarters of the division, camp, post or station at whichever of these places the mobilization point may be. The duplicate of the report of physical examination will be filed with the records of the division

surgeon in the office of the division adjutant or in the office of the camp, post or station surgeon at whichever of these places the mobilization point may be.

12. *Method of Forwarding Records:*

The different papers relating to the same soldier will not be fastened together but they will be left separated and forwarded to The Adjutant General of the Army with letter of transmittal in which will be enumerated in alphabetical order the names of the men whose papers are being transmitted. Where the papers of several soldiers are forwarded at the same time, separate packages will be made of forms No. 22–2, A. G. O., No. 1010, P. M. G. O., No. 260, A. G. O., etc., and the several packages with the letter of transmittal pertaining thereto, will be made into one bundle which will be mailed as directed above. Forms will be placed in packages in the same order in which the names appear in the letter of transmittal.

BY ORDER OF THE SECRETARY OF WAR:

JOHN BIDDLE,
Major General, Acting Chief of Staff.

OFFICIAL:

H. P. MCCAIN,
The Adjutant General.

5. The text of War Department Circular No. 111, dated December 4, 1918, is as follows:

DISCHARGE FROM THE DRAFT UNDER THE PRESIDENT'S ORDER OF NOVEMBER 11, 1918

1. Under the President's order of November 11, 1918, all registrants inducted by Local Boards, but who had not arrived at a

mobilization camp or station were ordered discharged.

2. In order that all records of such men may be properly completed, the following instructions will be complied with:

a. The following are the forms and records prepared by Local Boards and forwarded to the commanders of the Mobilization camps or stations concerned, for the discharge of the men designated in paragraph 1:

(1) Double Post Card, Form No. 1029, A and B, P. M. G. O., Original, no copies.

(2) Final Statement of Accounts, Form No. 2017, P. M. G. O., Original and two (2) copies.

(3) Physical Examination, Form No. 1010, P. M. G. O., Original and one (1) copy.

(4) Registration Card, Form No. 1, P. M. G. O., One (1) Form.

b. Immediately upon receipt of these records by the camp commanders concerned, the procedure indicated below will be followed:

(1) Form No. 1029 A and B will be completed as a rejection "Account Cancellation of Call under President's order of November 11, 1918," and forwarded to the appropriate local Board and the Provost Marshal General in the usual manner.

(2) The Original of Form No. 1010, P. M. G. O., and Form No. 2017, P. M. G. O., will be forwarded with Form No. 1, P. M. G. O., to the Adjutant General of the Army.

(3) A copy of Form No. 1010, P. M. G. O., will be transmitted to the camp surgeon.

(4) A discharge certificate, on a new blank form (Form No. 638–1, A. G. O.), will be made out by the camp commander and transmitted with the two remaining Forms Nos. 2017, P. M. G. O., to the disbursing quartermaster at the camp or station.

(5) The disbursing officer will use the two copies of Form No. 2017, P. M. G. O., as a statement of final account of the man concerned and will issue a check in settlement thereof in the same manner as in the settlement of final statements.

(6) The discharge certificate will be indorsed by the disbursing officer as to final settlement and will then be mailed, with check for amount due, to the man concerned at the address given.

(324.71, A. G. O.)

BY ORDER OF THE SECRETARY OF WAR:

PEYTON C. MARCH,
General, Chief of Staff.

Official:

P. C. HARRIS,
The Adjutant General.

6a. The following is the front of Form No. 638, A. G. O., edition of March 16, 1918:

DISCHARGE FROM DRAFT

[Seal]

TO ALL WHOM IT MAY CONCERN

This is to Certify, That_____
_____ is hereby DISCHARGED from the military service of the UNITED STATES by reason of_____

_____

_____

Said _____
was inducted into the service from the jurisdiction of the *Local Board for _____, *Adjutant General, State of _____, on the _____ day of _____, 191 .

While this certificate discharges the person named herein from his present obligation to serve in the Army, it does not operate as a permanent bar to his subsequent entrance into the military service. Under Section 5 of the Act of May 18, 1917, all registered persons remain subject to the draft unless exempted or excused as in that Act provided. Therefore, this discharge does not excuse the holder from obedience to the process of Exemption Boards.

Given at _____, this _____ day of _____, 191 .

By {command / order} of _____

_____
Adjutant.

*Strike out words not applicable.

NOTE.—This form will be used for discharge of aliens and alien enemies and of men rejected on account of physical unfitness, dependency, etc.

Form No. 638, A. G. O.
Ed. Mar. 6-18-100,000.

6b. The following is the back of Form No. 638, A. G. O., edition of March 6, 1918:

ACT OF MAY 18, 1917

SEC. 5. That all male persons between the ages of twenty-one and thirty, both in-

clusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this act; and every such person shall be deemed to have notice of the requirements of this act upon the publication of said proclamation or other notice as aforesaid given by the President or by his direction; and any person who shall willfully fail or refuse to present himself for registration or to submit thereto as herein provided, shall be guilty of a disdemeanor and shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, and shall thereupon be duly registered: *Provided,* That in the call of the docket precedence shall be given, in courts trying the same, to the trial of criminal proceedings under this act: *Provided further,* That persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for the registration, and all persons so registered shall be and remain subject to draft into the forces hereby authorized,

unless exempted or excused therefrom as in this act provided: *Provided further,* That in the case of temporary absence from actual place of legal residence of any person liable to registration as provided herein such registration may be made by mail under regulations to be prescribed by the President.

Section 177, Selective Service Regulations

Disposition of men rejected or discharged from military service at mobilization camp

When any selected man is rejected or discharged at a mobilization camp, the commanding officer thereof will promptly notify his Local Board of the fact, cause, and date of rejection or discharge, using Form 1029.

If the rejection or discharge is on account of the fact that the registrant is an alien, or an alien enemy, or that he is physically disqualified for general military service, the Local Board shall place the registrant forthwith in Class V. If the discharge or rejection is on account of dependency or any other cause for deferred clasification prescribed by these regulations, the Local Board shall proceed to reclassify the registrant in accordance with his status as determined by the action of the military authorities in discharging him.

7a. The front of an Honorable Discharge from the Army, in force at the end of 1918, was as follows:

HONORABLE DISCHARGE FROM THE UNITED STATES ARMY

[Seal]

TO ALL WHOM IT MAY CONCERN:

This is to Certify, That*_____
†_____
THE UNITED STATES ARMY, as a Testimonial of Honest and Faithful Service, is hereby Honorably Discharged from the military service of the United States by reason of ‡_____

Said _____ was born in _____, in the State of _____ When enlisted he was _____ years of age and by occupation a _____ He had _____ eyes, _____ hair, _____ complexion, and was _____ feet _____ inches in height.

Given under my hand at _____ this _____ day of _____, one thousand nine hundred and _____.

_____
_____
Commanding.

†Insert Army serial number, grade, company and regiment or arm or corps or department: e. g., "1,620,302"; "Corporal, Company A, 1st Infantry"; "Sergeant, Quartermaster Corps"; "Sergeant, First Class, Medical Department."

‡If discharged prior to expiration of service, give number, date, and source of order or full description of authority therefor.

Form No. 525, A. G. O.
Oct. 9–18.

7b. The back of the Honorable Discharge form, in force at the end of 1918, was as follows:

Enlistment Record

Name:_____ Grade:_____
Enlisted, or Inducted, _____, 191__,
at _____
Serving in _____ enlistment
at date of discharge.
Prior service:*_____
_____
Noncommissioned officer:_____
Marksmanship, gunner qualification or
rating:† _____
Horsemanship: _____
Battles, engagements, skirmishes, expeditions: _____
_____
_____
Knowledge of any vocation:_____
Wounds received in service:_____
Physical condition when discharged:_____
Typhoid prophylaxis completed:_____
Married or single:_____
Character: _____
Remarks: _____
_____
_____
_____
Signature of soldier:_____
_____
_____
Commanding_____

*Give company and regiment or corps or department, with inclusive dates of service in each enlistment.

†Give date of qualification or rating and number, date, and source of order announcing same.

8a. The front of a blue Discharge from the Army, in force at the end of 1918, was as follows:

DISCHARGE FROM THE UNITED STATES ARMY

TO ALL WHOM IT MAY CONCERN:

THIS IS TO CERTIFY, That*_____

†_____

THE UNITED STATES ARMY is hereby DISCHARGED from the military service of the UNITED STATES by reason of ‡_____

_____

_____

Said_____ was born in _____, in the State of _____

When enlisted he was _____ years of age and by occupation a _____

He had _____ eyes, _____ hair, _____ complexion, and was_____ feet _____ inches in height.

Given under my hand at_____ this _____ day of _____, one thousand nine hundred and _____.

_____

_____

Commanding.

---

*Insert name—Christian name first; e. g., "John Doe."

†Insert Army serial number, grade, company, and regiment, or arm of corps or department; e. g., "1620302," "Corporal, Company A, 1st Infantry;" "Sergeant, Quartermaster Corps;" "Sergeant, First Class, Medical Department."

‡State fully actual cause of discharge, giving number, date, and source of order or full description of authority therefor.

Form No. 526, A. G. O.
Oct. 9, 1918.

8b. The back of the blue discharge form, in force at the end of 1918, was identical with the back of the Honorable Discharge form, *supra,* item 7b, p. 73, except that, after the line for the soldier's signature and above the line for the commanding officer's signature, there are inserted, at the left, the words, **"Is not recommended for reenlistment."**

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